

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KEITH E. WOODS**

Claimant

VS.

**TOLLE FURNITURE GROUP**

Respondent

AND

**CONTINENTAL WESTERN INS. CO.**

Insurance Carrier

Docket No. 1,022,984

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the Post-Medical Award entered by Administrative Law Judge Nelsonna Potts Barnes. This claim was placed on the Board's summary calendar for determination without oral argument. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. James M. McVay, of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment to his neck, finding claimant failed to prove the requested neck treatment is causally related to his shoulder injury. The ALJ found that Dr. Patrick Do shall continue to be claimant's authorized treating physician to treat his right shoulder.

The Board has considered the record as listed in the Post-Medical Award, as well as the transcript of the Preliminary Hearing held June 23, 2005; the transcript of the Post-Award Hearing held August 18, 2009, with exhibits; the deposition of Larry Bates, Sr., taken March 1, 2010; the deposition of Dr. Val Brown taken March 1, 2010; the deposition of Dr. Pat Do taken March 3, 2010, and exhibits; and the transcript of the Preliminary Hearing held July 7, 2011.

### ISSUES

Claimant asks the Board to reverse the Post-Medical Award entered by the ALJ and order medical treatment for claimant's neck condition.

Respondent argues the ALJ correctly found that claimant did not prove his neck complaints were causally related to his shoulder injury.

The issue for the Board's review is: Is claimant's need for medical treatment to his neck related to his work-related accident of December 7, 2004, and/or his resulting right shoulder injury?

### FINDINGS OF FACT

Claimant originally injured his right shoulder in a work-related accident on December 7, 2004. He underwent two surgeries to his right shoulder. On March 29, 2007, a running award was entered in which the parties stipulated that claimant had a 13.8 percent impairment of function to claimant's right shoulder as a result of his 2004 work-related accident. Future medical was left open to be received after proper application to and approval by the Division of Workers Compensation.

Claimant filed an Application for Post Award Medical on June 26, 2009. In the ALJ's post-award medical Award dated May 14, 2010, she authorized Dr. Do to be claimant's authorized treating physician. Claimant underwent a third surgery on his right shoulder, an arthroscopy with extensive debridement of the glenohumeral joint, subacromial decompression, and rotator cuff repair, which was performed by Dr. Do on May 24, 2010. Claimant was released by Dr. Do as being at maximum medical improvement on September 30, 2010. On that day, claimant's chief complaint was localized pain over his acromion clavicular (AC) joint in his right shoulder, the area where his collar bone meets the acromion.

On December 22, 2010, claimant filed an Application for Post Award Medical asking for additional medical treatment to his neck. A post-award hearing was held on February 22, 2011, at which time claimant testified he began to develop problems with his neck after the May 24, 2010, surgery, specifically during his post-surgery physical therapy treatment. He stated he had never had a problem with his neck before then. Claimant had about three months of physical therapy after his surgery. He said when the therapist would raise his arm up and put his right shoulder through range of motion exercises, the pain went through his neck. He said he complained to the therapist, Dr. Do, and Dr. Val Brown, his personal physician, about the pain caused by the therapy. Claimant testified the pain in his neck now is worse than when he concluded physical therapy in the summer of 2010. He has a constant sharp pain in his neck that starts at the point where he had the May 2010 surgery and goes up the right side of his neck. He also complained of having

headaches about every three days. He has been taking pain medication prescribed for him by Dr. Brown.

Dr. Pedro Murati, a board certified independent medical examiner who is also board certified in physical medicine and rehabilitation and electrodiagnostic medicine, examined claimant on November 17, 2010, at the request of claimant's attorney.<sup>1</sup> Claimant told Dr. Murati he was injured on February 11, 2005,<sup>2</sup> when a hide-a-bed was pushed onto his right shoulder. Claimant told Dr. Murati he immediately noticed pain in his right shoulder, neck and right side of his chest. He told Dr. Murati that in treating his shoulder, he underwent multiple injections in his right shoulder and attended multiple sessions of physical therapy. Claimant also told Dr. Murati that he told Dr. Brown about his neck pain but Dr. Brown did not want to do anything about it because it was work related. Claimant did not tell Dr. Murati that his neck problems started during physical therapy after the May 2010 surgery.

At the time of Dr. Murati's examination, claimant was complaining of pain in the right shoulder, popping of the right shoulder, and being unable to use his right hand to drive. He also said he experienced neck and chest pain and occasional headaches. After his examination, Dr. Murati diagnosed claimant with neck pain with signs and symptoms of radiculopathy, myofascial pain syndrome affecting the right shoulder girdle extending into the cervical paraspinals, right double crush syndrome with carpal tunnel syndrome, pectoralis strain on the right, status post arthroscopic SLAP repair and rotator cuff repair, and status post right shoulder arthroscopy with extensive debridement. Dr. Murati stated the diagnoses were all a direct result of the work-related injury of February 11, 2005, and were a result of claimant's injured shoulder.

Dr. Murati recommended an MRI of claimant's cervical spine to rule out any disc pathology and a bilateral upper extremity NCS/EMG to include the paraspinals to evaluate or document any radiculopathy. He recommended physical therapy, anti-inflammatory and pain medication as needed, and a series of cervical epidural steroid injections. He noted that if claimant failed to improve with conservative treatment, he would recommend a surgical consultation.

Dr. Murati was aware that claimant was involved in an automobile accident in early 2005 and as a result sustained neck problems. However, Dr. Murati indicated those problems resolved over time. Also, Dr. Murati reviewed claimant's post award medical hearing testimony of February 2011 wherein claimant said he did not have neck problems before the surgery of May 2010. Dr. Murati said apparently claimant believes it was the

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<sup>1</sup> Dr. Murati had previously examined claimant in this matter in 2006.

<sup>2</sup> It appears that claimant originally filed an Application for Hearing on May 4, 2005, setting out a date of accident of February 11, 2005, and later amended the Application for Hearing on May 25, 2005, to change the date of accident to December 7, 2004.

therapy that caused his neck pain, but Dr. Murati did not share in that belief.<sup>3</sup> He was of the opinion that claimant's neck pathology was already present and it took the therapy to bring it forth. Dr. Murati's best explanation of claimant's neck problem is that it is due to an overuse syndrome of having a bad right shoulder.

Dr. Pat Do, a board certified orthopedic surgeon, was claimant's authorized treating physician. He first saw claimant on September 24, 2009, when he performed an independent medical examination (IME) at the request of the ALJ. He examined claimant a second time on November 10, 2009. His examinations were limited to claimant's right shoulder. He was named as claimant's authorized treating physician in May 2010 and performed surgery on claimant's right shoulder on May 24, 2010. After the surgery, he sent claimant to physical therapy.

Dr. Do saw claimant on September 30, 2010. At that time, claimant's chief complaint was right shoulder pain. There were complaints of pain to the AC joint area. Claimant indicated he had no other new complaints. There is no notation in Dr. Do's medical report of September 30, 2010, that claimant made any complaints about his neck. Dr. Do stated that if a patient would make a complaint of a new condition to him or to the physical therapists, that complaint would be noted in the medical records. Claimant was released as being at maximum medical improvement as of October 1, 2010.

Claimant returned to see Dr. Do again on March 1, 2011. At that time, he complained of pain to the right shoulder and per-scapular/neck musculature. Claimant told Dr. Do those symptoms of pain and tightness had increased over the past several weeks. He denied new injury or a change in his medical history. Dr. Do said March 1, 2011, was the first time his records show that claimant made any complaint about neck pain, either to him or to the physical therapists. When Dr. Do examined claimant on March 1, 2011, he found that claimant was nontender in the cervical spine and he showed no deficits in the neurologic examination. Other than neck pain, claimant had no new findings in the examination. Dr. Do diagnosed claimant with shoulder pain, right impingement residual, and associated myofascial pain, which refers to the pain claimant was describing up into his neck. Dr. Do recommended claimant have anti-inflammatory medication, a muscle relaxant, and trigger point injection, as well as some physical therapy.

Dr. Do saw claimant again on May 3, 2011. At that time, claimant was still having complaints of pain in his shoulder that had started to move up into his neck. On physical examination, Dr. Do stated almost all claimant's pain was over his AC joint. Dr. Do and claimant discussed doing a fourth surgery to remove a portion of the distal clavicle to address the AC joint pain.

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<sup>3</sup> Dr. Murati made this statement after being told about claimant's testimony that he had no neck pain before the May 2010 surgery.

Dr. Do acknowledged that referred pain to the neck can sometimes come from the shoulder. He also indicated that shoulder misalignment can cause shoulder and neck pain.

### PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.<sup>4</sup> In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.<sup>5</sup>

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,<sup>6</sup> the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,<sup>7</sup> the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's

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<sup>4</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>5</sup> K.S.A. 2010 Supp. 44-510k(a). See *Siler v. Shawnee Mission School District, USD 512*, 45 Kan. App. 2d 586, 251 P.3d 92 (2011).

<sup>6</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

<sup>7</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,<sup>8</sup> the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,<sup>9</sup> the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."<sup>10</sup>

In *Logsdon*,<sup>11</sup> the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

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<sup>8</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>9</sup> *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

<sup>10</sup> *Id.* at 728.

<sup>11</sup> *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

Finally, in *Casco*,<sup>12</sup> the Kansas Supreme Court states: “When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”

### **ANALYSIS**

The ALJ determined that claimant failed to prove a direct causal connection between claimant’s current neck symptoms and either the December 7, 2004, accident or the subsequent treatment claimant received for the shoulder injury attributable to that accident. The Board agrees.

First, claimant has been inconsistent about the onset of his neck symptoms and their cause. Claimant testified that his neck symptoms began following his third shoulder surgery, which was performed by Dr. Do on May 24, 2010. Specifically, claimant described a specific incident occurring during physical therapy where he noticed the onset of neck pain when the therapist was having him do range of motion exercises. Claimant denied ever having a problem with his neck before this incident. However, claimant told Dr. Murati that his neck problems started with the accident on December 7, 2004. In addition, claimant said he reported the neck injury to the physical therapist at the time and subsequently reported it to Dr. Do. Their contemporaneous records do not contain any mention of that event.

Second, Dr. Do attributes all of claimant’s symptoms to the shoulder. He acknowledges claimant’s description of neck pain but attributes that to referred pain from the shoulder injury and the subsequent surgeries. Dr. Do does not find any specific pathology in the neck. To the extent there is any additional injury or disease process going on in the neck or paraspinal muscles, Dr. Do does not attribute that to claimant’s accident or work-related injury. In this instance, the Board finds the causation opinions of Dr. Do more credible than those of Dr. Murati. This conclusion is due in part because Dr. Do was the court-appointed independent medical examiner and is the treating physician but also because Dr. Do relied upon a more accurate history of the onset and progression of claimant’s neck complaints. Also, the Board does not accept Dr. Murati’s theory of the neck injury being due to overuse syndrome as a result of the right shoulder injury.

### **CONCLUSION**

Claimant has failed to prove a work-related injury to his neck.

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<sup>12</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Post-Medical Award of Administrative Law Judge Nelsonna Potts Barnes dated September 14, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
James M. McVay, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge